SOUTHERN UTAH WILDERNESS ALLIANCE
UTAH CHAPTER, SIERRA CLUB

IBLA 92-66 Decided February 7, 1992

Appeal from a decision of the Area Manager, Grand Resource Area, Utah, Bureau of Land Management, approving notice of intent to conduct geophysical oil and gas exploration and finding that no significant environmental impact would result. UT-068-91-073.

Affirmed as modified.

1. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas Leases: Generally

   It was proper for BLM to approve a notice of intent to conduct oil and gas geophysical exploration operations utilizing truck-mounted vibrating equipment and seismic wave receiving stations after considering the environmental impact of the contemplated operations and alternatives thereto (including the no-action alternative), and concluding that no significant impact would result. Under the facts of this case, there was no error in BLM's failure to consider the possible subsequent drilling of a proposed well in the project area in conjunction with geophysical exploration operations.

APPEARANCES: Scott Groene, Esq., Southern Utah Wilderness Alliance, Moab, Utah, for appellants; Robert E. Lowe, Vice President, Western Geophysical Company, Houston, Texas, for Western Geophysical Company; Charles L. Kaiser, Esq., Denver, Colorado, for Chevron U.S.A., Inc.,; David K. Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Southern Utah Wilderness Alliance (SUWA) and the Utah Chapter of the Sierra Club (collectively appellants) have appealed from a September 11, 1991, decision by the Area Manager, Grand Resource Area, Utah, Bureau of Land Management (BLM), approving a proposed geophysical oil and gas exploration operation, known as the "Paradox Seismic Survey-The Knoll Prospect (3-D)," and finding of no significant impact (FONSI).

In May 1991, the Western Geophysical Company (WGC) filed a notice of intent (NOI) to conduct geophysical oil and gas exploration in secs. 17-21, 28-30, T. 25 S., R. 18 E., Salt Lake Meridian, Grand County, Utah, for the benefit of Chevron U.S.A., Inc. (Chevron). This area, known as the "Knoll Prospect," lies between Hell Roaring and Spring canyons, west of Moab, Utah. WGC proposed conducting a three-dimensional (3-D) seismic survey, utilizing vibroseis, to ascertain the presence of geologic features at depth which might be favorable to oil and gas.

The survey would be conducted using 40,000-pound vibrating equipment (vibrators) mounted on trucks, which would cross the survey area in a zig-zag pattern along 15 survey lines 660 feet apart. The vibrators would be operated along each line every 165 feet for a distance of 660 feet with a 660-foot segment between operation sections where there would be no testing. The total distance traversed by the vibrators along the 15 survey lines would be about 26 miles, with a resulting disturbances of about 10.3 acres. Fist-sized geophones (receiving equipment) would be linked by electrical cable along 16 parallel lines at right angles to the vibrator lines for the distance of about 29 miles. The geophones and cable would be transported to designated points in the project area by helicopter, and would then be carried to the proper location by foot and placed on or inserted slightly into the ground at 165-foot internals. Following the survey, equipment would be collected and taken away by helicopter, the disturbed area would be cleaned of refuse, scarified, and reseeded as necessary. It was estimated that the on-the-ground activity would take about 2 weeks to complete.

The record indicates that the proposed seismic survey is part of Chevron's overall plan to explore for, and, if warranted, develop oil and gas in southeastern Utah. The survey is specifically intended to provide further knowledge of subsurface structural geology and to increase the chances of successfully completing the proposed No. 1-20 exploratory well to be located in Federal oil and gas lease, U-58070. 1/ Specifically, the information gained from survey will be used to map the location of the Cane Creek zone of the Paradox formation so that the well can ultimately be drilled to and horizontally through likely oil and gas-bearing portions of that zone. Although attempts to produce oil and gas in the vicinity have been largely unsuccessful, horizontal drilling, guided by the more detailed data generated by a 3-D seismic survey, is expected to improve the likelihood of finding economic quantities of oil and gas.

BLM entered into a memorandum of understanding with WGC in June 1991 for joint preparation of an environmental assessment (EA) (UT-068-91-073) to assess the environmental consequences of the proposed survey and related activity, and alternatives thereto (including no action). This assessment was undertaken to satisfy the procedural requirements.

1/ Lease U-58070 was issued effective June 1, 1988. It encompasses a portion of the land to be surveyed, i.e., secs. 17, 18, and 20, T. 25 S., R. 18 E., Salt Lake Meridian, Grand County, Utah. Well No. 1-20 would be located in sec. 20.

of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1988). BLM is ultimately responsible for assuring compliance with NEPA and the memorandum of understanding provided that the EA would be subject to acceptance by BLM.

A draft EIS was prepared and circulated for public comment. Changes were made in response to 10 comments, including one from counsel for appellants, and the EA was finalized. The contemplated seismic survey and related activities, as finally proposed, included a number of additional measures designed to minimize the environmental impact of the proposed action. BLM accepted the final EA in September 1991. On September 11, 1991, the Area Manager issued his Decision Record and FONSI (Area Manager's decision). Based on the EA, he concluded that the proposed seismic survey and related activities, subject to the specified mitigating measures, would not significantly affect the human environment and thus no environmental impact statement (EIS) was required. He also approved WGC's NOI, conditioned upon incorporation of the listed mitigating measures. Appellants appealed from the Area Manager's decision.

By order dated November 27, 1991, the Director, Office of Hearings and Appeals, assumed limited jurisdiction over the appeal, pursuant to 43 CFR 4.5(b), to act on requests that the Area Manager's decision be placed in full force and effect pursuant to 43 CFR 4.21(a) by lifting the automatic stay normally imposed by that regulation. On December 24, 1991, the Director issued an order placing the Area Manager's decision in full force and effect. 2/ This had the effect of permitting the approved seismic survey and related activity to proceed, subject to the conditions attached to the NOI. The Director then returned jurisdiction to the Board and directed the Board to afford the appeal expeditious consideration.

In their statement of reasons (SOR) for appeal, appellants raise a number of allegations regarding the Area Manger's September 1991 approval of WGC's NOI. In particular, they contend that BLM did not properly fulfill its responsibility under section 102(2)(C) of NEPA when considering the environmental consequences of permitting oil and gas exploration and the alternatives thereto. They assert that the EA reflects deficiencies in BLM's analysis of the environmental consequences, specifically asserting that BLM failed to consider the cumulative environmental impacts of the proposed drilling that well is "reasonably foreseeable" and "connected" to the proposed activity (SOR at 17); Appellants' Reply to Chevron's Motion to Dissolve Automatic Stay at 11). Citing Taxpayers Watchdog, Inc. v. Stanley, 819 F. 2d 294, 298 (D.C. Cir. 1987), they argue that the cumulative impact of these activities must be considered because they lack "independent utility" (i.e., the seismic work would not be conducted but for the need to supply accurate data for the drilling and the drilling would not be undertaken without that survey). Ultimately, they contend that to fail to consider these activities together "segment[s]" Chevron's overall project, thus

2/ The Director's action obviates any need for the Board to act on Chevron's Nov. 21, 1991, motion to dissolve the stay.

improperly ignoring the significant environmental impacts that may result (Appellants' Reply to Chevron's Motion to Dissolve Automatic Stay at 11).

[1] Under section 102(2)(C) of NEPA, BLM must prepare an EA to determine whether a proposed Federal action will "significantly affect the quality of the human environment," thus requiring preparation of an EIS. 42 U.S.C. § 4332(2)(C) (1988). See Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985). When preparing an EA, consideration of potential environmental impact must encompass both the anticipated impacts of the proposed action and the impacts which might result from the proposed action in conjunction with other "reasonably foreseeable" actions. 40 CFR 1508.7; Colorado Environmental Coalition, 108 IBLA 10, 16 (1989).

In the broadest sense, drilling of the well might be considered a reasonably foreseeable consequence of a seismic survey, thus requiring consideration of any cumulative impact that might result from the survey and the drilling. However, Chevron's contemplated drilling of the No. 1-20 well following the seismic survey is by no means a foregone conclusion. It is possible that the results of the seismic survey will disclose that there are not sufficient oil and gas "targets" and/or suitable geophysical conditions to justify drilling that well, let alone the development of oil and gas that might be produced from it.

Appellants have not identified any cumulative impact likely to be caused by the survey and the drilling of that well which were overlooked by BLM. Nor can we discern any. However, appellants' arguments raise the question of the proper scope of the EA. Basically, they contend that the scope of the seismic exploration EA should be expanded to include both the seismic survey and the anticipated drilling of the No. 1-20 well, to ensure that a cumulatively significant impact has not been overlooked. As the basis for this contention they rely on 40 CFR 1508.25, which sets out situations in which an agency should consider different actions together. The first situation, which appellants largely rely upon, is "[c]onnected actions." 40 CFR 1508.25(a)(1). Actions are deemed connected "if they: (i) Automatically trigger other actions * * * [;] (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously[; or] (iii) Are interdependent parts of a larger action and depend on the larger action for their justification." Id. The regulation was promulgated to avoid segmenting interrelated projects such that cumulatively significant environmental impacts are overlooked or, worse, deliberately ignored, in violation of section 102(2)(C) of NEPA. See Taxpayers Watchdog, Inc. v. Stanley, supra at 298; Thomas v. Peterson, supra at 758; John A. Nejedly, 80 IBLA 14, 18 (1984).

The seismic survey and the drilling of well No. 1-20 are not connected actions within the meaning of 40 CFR 1508.25(a)(1). The drilling of the No. 1-20 well is not necessary consequences of the seismic survey. It is equally possible that survey results may dissuade Chevron from further activity, or cause it to adjust its corporate thinking regarding other contemplated activity in the Paradox Basin. More important, however, is the fact that BLM's approval of this seismic activity does not commit BLM

to approve any additional proposed activities. The proposal to drill well No. 1-20 must undergo a separate permitting process, which will require preparation of another EA. 3/ There is no basis for a finding that the survey automatically triggers the drilling of well No. 1-20. See Glacier-Two Medicine Alliance, 88 IBLA 133, 146 (1985) (field development not automatic result of drilling exploratory well); cf. Thomas v. Peterson, supra at 758 n.2) approved timber sales awaiting only approval and construction of access road).

We believe the following further analysis makes it apparent that the two activities are not connected actions, as contemplated by the regulation. Chevron could proceed with drilling well No. 1-20 without performing the seismic survey and could do so if the seismic results proved totally unfavorable. Seismic survey may be an important tool when deciding whether to drill, but it is not an important tool when deciding whether to drill, but it is not a prerequisite for drilling, and drilling can be undertaken without seismic exploration. Seismic survey and drilling are not interdependent parts of a larger action. Drilling has a utility quite independent from that of a survey in terms of permitting the actual discovery and extraction of oil and gas. In turn, a seismic survey may have a utility independent from the drilling of the well when providing valuable information regarding general and larger scale geologic conditions likely (or unlikely) to indicate the presence of oil and gas. The activities are not a part of some larger action. At best, favorable results from the seismic survey and the drilling of the well will encourage further exploration and development in the area. See generally Sierra Club, 111 IBLA 122 (1989), aff'd Sierra Club v. Hodel, 737 F. Supp. 629 (D. Utah 1990) (gravel pit and road improvement); Glacier-Two Medicine Alliance, supra at 146 (exploratory well and field development); cf. Thomas v. Peterson, supra at 758-59 (timber sales and associated access road construction); Sierra Club, supra at 135 (road improvement project).

The regulation found at 40 CFR 1508.25(a) also provides other situations requiring consideration of separate actions. "Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts" must be considered together. 40 CFR 1508.25(a)(2). We find it easy to find this section of the regulation inapplicable. Appellants have failed to present any evidence that the seismic survey and the possible drilling of well No. 1-20 may have a "cumulatively significant impact,"

3/ By the time the EA was approved Chevron had filed a notice of staking and BLM was preparing a separate EA for the No. 1-20 well. In this context, BLM stated that, even though Chevron has the right to explore for and develop oil and gas underlying the leased land, "[a]pproval of the seismic survey by the BLM does not automatically trigger approval of an Application for Permit to Drill a well within the project area" (EA at 1-2). Chevron informs us that the EA with respect to well No. 1-20 has been finalized and drilling of the well approved. See Appellants' Reply to Chevron's Motion to Dissolve Automatic Stay at 10 nn. 7, 8. Nevertheless the fact remains that Chevron is not bound to go forward with drilling following completion of the seismic survey.

and we discern no basis for such a conclusion. Compare with Thomas v. Peterson, supra at 759.

The final situation identified in 40 CFR 1508.25(a) is "[s]imilar actions which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." 40 CFR 1508.24(a)(3). There is no question that the approved seismic survey and the proposed site for well No. 1-20 share a common geography. The proposed location of the well is within the project area. However, the two actions do not share a common timing as the drilling would follow the seismic work. Nor can we say that there are any other similarities between the construction associated with drilling a well and traversing the land for a short period of time with truck-mounted vibrators generating seismic waves picked up by nearby geophones. Assuming that the actions could be considered similar under 40 CFR 1508.25(a)(3), BLM does not require a joint assessment of the environmental impact of the actions unless the "best way to assess adequately the combined impacts of [such] actions * * * is to treat them in a single [document]." Appellants fail to demonstrate that the drilling and the seismic survey will result in any combined impacts or that BLM cannot properly assess those impacts in separate EA's.

The EA is not fatally flawed because BLM failed to jointly consider the seismic survey and the drilling of well No. 1-20. Appellants presented no evidence that these activities are likely to cause any cumulative impact, significant or otherwise, which BLM has not considered, or will not consider, by reason of its decision to prepare separate EA's. 4/ Thus, we do not find that BLM has segmented a single project to avoid recognition of a cumulative report. Ultimately, BLM must be judged by whether it has fulfilled the intent of section 102(2)(C) of NEPA. See Sierra Club, Inc., 92 IBLA 290, 302 (1986). We find that it has.

Appellants contend that BLM failed to seriously consider the no-action alternative, i.e., the alternative of not permitting the proposed seismic exploration. They note that BLM mentioned the no-action alternative in the draft EA but concluded that it would not be considered because BLM did not have authority to preclude exploration under oil and gas lease U-58070. Appellants argue that the flaw stems from the fact that BLM failed to fully consider the environmental impact of oil and gas exploration before issuing the oil and gas lease. Citing Sierra Club v.

4/ When it prepared the EA for the exploratory well, BLM was also required to consider any cumulative impact for drilling when coupled with the prior seismic survey. See 40 CFR 1508.7 and 508.25. Further, although BLM generally cannot preclude Chevron from engaging in some form of exploration, it may impose suitable conditions limiting, or even denying Chevron, the right to do drilling which would contribute to an unacceptable cumulative environmental impact. See, e.g., Powder River Basin Resource Council, 120 IBLA 47, 54-55 (1991). There is no evidence that BLM did not properly exercise its authority in this regard.

Peterson, 717 F.2d 1409, 1415 (D.C. Cir. 1983), they assert that BLM may not issue leases without considering the environmental impact of explorations unless it retains the authority to preclude surface disturbing activities. See also Conner v. Burford, 836 F.2d 1521, 1532 (9th Cir. 1988); Union Oil Company of California, 102 IBLA 187 (1988). Appellants contend that BLM should have considered the environmental impact of exploration when issuing the lease without retaining this authority. The conclude that because the Department did not, it must either hold the lease to have been illegally issued (and presumably cancel the lease and being the environmental review process anew) or consider the environmental consequences of a decision to permit exploration, recognizing that it has the authority to now preclude the exploration.

In the draft EA, BLM stated:

> The oil and gas lease issued by the BLM grants Chevron the right to explore for oil and gas on lands within the project area. The No Action Alternative would required BLM to deny Chevron's request to conduct an exploration program. Under the conditions of the lease held by Chevron, this alternative is outside the BLM's jurisdiction.

(Exh. G attached to Appellants' Reply to Respondent's Answer at 1-2). In its comment on the draft EA, SUWA challenged these statement, stating that "BLM does have the authority to deny the proposal" (Letter to BLM from SUWA, dated Aug. 8, 1991, at 2). The statement that BLM does not have the authority to preclude the contemplated activity was dropped from the final EA, and the Area Manager acknowledged the fact that SUWA's comment was the basis for the revision in his September 11, 1991, decision. This is significant because the statements in the draft EA had incorrectly suggested that BLM does not have the authority to deny a particular proposed exploration plan, as distinguished from the authority to preclude all proposed exploration. When preparing the final EA and in the Area Manager's decision, BLM properly recognized its authority to deny the seismic exploration proposal. We find evidence that BLM did, in fact, seriously consider the no-action alternative before issuing its final EA.

The fact remains that the lease has been issued. BLM has entered into a contractual relationship with the lease. Accordingly, BLM does not have the authority to preclude all exploration (or even all development) within the confines of the lease. See Getty Oil Co. v. Clark, 614 F. Supp. 904, 915 (D. Wyo. 1985). 5/ In any case, what BLM should have or should not

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5/ Appellants contend that Getty Oil does not correctly set forth Chevron's rights to explore and develop because that case involved a lease issued prior to the passage of NEPA. See Appellants' Reply to Chevron's Motion to Dissolve Automatic Stay at 6 n.5. We find no merit in this contention. NEPA is a procedural law and has no bearing on the scope of a lessee's rights under a Federal oil and gas lease. NEPA imposes a procedural obligation on BLM when considering issuance of a lease and deciding whether to permit proposed exploration and development, i.e., to consider

have done when the lease was issued is not relevant in the context of the current proposed exploration. The time for challenging issuance of the lease has long since passed, and may not now be challenged. 6/ See Turner Brothers, Inc. v. Office of Surface Mining Reclamation and Enforcement, 102 IBLA 111, 121 (1988). The EA and related documents provide sufficient basis for finding that BLM fully considered the environmental impact of the seismic exploration proposed by WGC, including the alternative of not permitting that activity. This fully satisfies the requirements of section 102(2)(C) of NEPA, regardless of whether BLM can now preclude all exploration.

Appellants also contend that, in the context of deciding to approve the proposed exploration plan, BLM properly declined to consider alterative multiple uses of the land, e.g., designation as wilderness 7/ or an area of critical environmental concern (ACEC) (so as to protect, among others, naturalness, outstanding opportunities for solitude and recreation, desert bighorn sheep, and archaeological resources), on the basis that BLM was already committed to approving some form of exploration by virtue of issuance of the lease. They assert that this violated the multiple-use mandates of FLPMA, as amended, 43 U.S.C. §§ 1701-1784 (1988). BLM is charged with managing public lands "on the basis of multiple use." 43 U.S.C. § 1701(a)(7) (1988). Multiple use is generally considered in the context of BLM's land-use planning. See 43 U.S.C. § 1712(a) and (c) (1988). In fact, alternate uses of the land were considered when adopting

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fn. 5 (continued)
the environmental consequences before acting. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). Thus, Getty Oil is directly on point regarding the nature of those rights. Indeed, appellants justifiable concern regarding consideration of the environmental impact of exploration at the time of leasing indicates the far-reaching nature of the rights accorded the lessee at that time. See also Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1229 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989).

6/ We note that the draft EA referred to the fact that BLM had issued lease U-58070 and stated that Chevron "was given the right to explore for and develop oil and gas resources underlying the leased land." A copy of the draft EA was provided to counsel for appellants, as acknowledged in his Aug. 8, 1991, letter commenting on the EA. Thus, appellants must be deemed to have had notice that the lease had been issued at least as of that date. Their subsequent challenge to issuance, first raised in their Nov. 12, 1991, SOR, is untimely under 43 CFR 4.411(a). See Minchumina Homeowners Associations, 93 IBLA 169, 173 (1986).

7/ The project area is part of an area which has been proposed for designation as wilderness, but has not yet been so designated. See EA at 2-12. It was not formally designated by BLM as part of a wilderness study area (WSA), pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(a) (1988), and thus is not entitled to protection as a WSA. Compare with Southern Utah Wilderness Alliance, 114 IBLA 326 (1990).

the Resource Management Plan (RMP) in June 1985. They need not be considered anew each time BLM decides to lease the land or grant leave to undertake an activity.

To the extent that appellants challenge the RMP because BLM failed to consider certain alternative uses of the land) e.g., designation as wilderness or an ACEC), their challenge must fail. 8/ Appellants can only object to the manner in which the RMP has been implemented, and they have not established that the seismic survey violates the RMP. See Albert Yparraguirre, 105 IBLA 245, 248 (1988). BLM considered the impact of the proposed action on all of the resources appellants seek to protect, and the fact that appellants would prefer other exclusionary uses of the land does not establish error. See Oregon Shores Conservation Coalition, 83 IBLA 1, 8 (1984); Preserve Our Scenic Environment, 47 IBLA 276, 279 (1980); California Association of Four-Wheel Drive Clubs v. Andrus, No. 79-1797-N (S.D. Cal. Aug. 5, 1980).

BLM is required by section 7(a)(2) of the ESA to consult with FWS if a proposed action may affect a threatened or endangered species, to ensure that the action is not likely to jeopardize the continued existence of the species. See also H.R. Rep. No. 1625, 95th Cong., 2d Sess. 11, reprinted in 1978 U.S. Code Cong. & Admin. News 9453, 9461; 50 CFR 502.14(a); Enos b. Marsh, 769 F.2d 1363, 1368 (9th Cir. 1985). BLM concluded that the proposed seismic survey and related activity would not affect either the peregrine falcon or the bald eagle (which are not know to be present in the project area) and, thus, was not required to consult with FWS. See Exh. D attached to Appellants' Reply to Respondent's Answer at 1 ("endangered * * * animal species would not be impacted").

8/ In their SOR, at pages 13-16, appellants initially challenged BLM's failure to consider alternative multiple uses of the subject land, as well as surrounding lands, in the applicable RMP. However, in their Reply to Respondent's Answer, at page 4, appellants assert that they are not challenging any BLM "planning decision." They have, thus, apparently retracted their objection to the RMP. See also Appellants' Reply to Chevron's Motion to Dissolve Automatic Stay at 9-10. In any case, the Board has no jurisdiction to consider challenges to BLM's land-use planning decisions. See, e.g., Hutchings v. BLM, 116 IBLA 55, 61 (1990). Such challenges must be pursued through a separate inter-Departmental process. See 43 CFR 1610.5-2.

In the EA it was noted that the peregrine falcon may nest in canyons near the project area, beginning in February or early March, and may use the project area for foraging. See EA at 2-21. However, BLM stated that although the seismic survey (which will entail a certain amount of human activity would commence and conclude "after the nesting period," BLM concluded that birds might be displaced during the survey, but would return following it. See id.

Appellants argue that the conclusion that peregrine falcons may be temporarily displaced by the seismic survey indicates that the survey "may affect" these birds, thus requiring consultation with FWS. We disagree. There is nothing in the record and appellants offer nothing to even suggest that temporarily displacing those birds for a small portion of their foraging habitat would have more than a de minimis effect. Without evidence that this activity would have more than a de minimis impact, we are unwilling to find that the impact triggers the section 7(a)(2) consultation requirement. Consultation is necessary to insure that a proposed actions not likely to jeopardize the continued existence of the endangered species. We do not believe that Congress intended to impose a requirement that consultation is necessary if all indications are that there is only a remote possibility that a member of an endangered species may be disturbed for a short duration during a period other than the time of year when it is critical that the apparent likelihood that the proposed action would jeopardize a peregrine falcon and appellants have presented nothing to the contrary.

BLM noted that the bald eagle may use nearby canyons during the winter, i.e., from November to March (see EA at 2-21), but that no impact to this wintering population would occur because the survey "would take place in August." Id. at 3-16. Appellants argue that this bird may be affected because the survey was approved in September 1991, and may take place at any time. Otherwise, they have provided no evidence that the bird may be affected by the survey which would require consultation with FWS. BLM clearly misstated its conclusion that no impact to the wintering populations of bald eagle would occur because the survey would take place "in August." At page 1-4 of the EA, BLM stated that the seismic survey was "scheduled to begin in September, 1991" and would take about 2 weeks. They survey was not approved until September 11. Nevertheless, the Area Manager approved the survey "as proposed" (Area Manager's decision). This means that they survey was to take place in September 1991 and completed within about 2 weeks. See 43 CFR 3151.1 ("Signing of [NOI] by the operator shall signify agreement to comply * * * with all practices and procedures specified at any time by the authorized officer" (emphasis added)). Thus, as correctly stated in the EA, the survey would have been completed without impact to the wintering population of bald eagle.

When they appealed the Area Manager's decision the appellants delayed the seismic survey until the Director's December 1991 order. Upon issuance of that order WGC was free to commence the survey at any time, including

during the period when bald eagles may be wintering in the canyons near the project area. The EA indicates that an impact might occur if the survey take place while eagles are wintering in the canyons. In addition the finding that the seismic survey would have no significant impact on the peregrine falcon was predicated on the fact that the seismic survey would not occur during the nesting period. The recognition of and concern for these seasonal occurrences were thus addressed in the EA, and the Area Managers's decision was framed to have the survey started and completed during what was found to be a noncritical period of the year. This may no longer hold true. The delay caused by this appeal now requires the modification of the Area Manager's decision to avoid a possible violation of section 7(a)(2) of the ESA and 50 CFR 402.14(a). Accordingly, we deem it appropriate to modify the Area Manager's decision to provide that the contemplated activity may not take place during the nesting period of the peregrine falcon or while bald eagles are wintering in the canyons surrounding the project area without prior consultation with and determination by FWS that the proposed action would not jeopardize the continued existence of the peregrine falcon or the bald eagle.

Finally, appellants contend that BLM improperly permitted "non-casual" geophysical activities on the land prior to final approval of the NOI. They assert that BLM allowed WGC to operate motor vehicles across the project area away from established roads and trails while placing flags during the 30-day period following the Area Manager's decision, when any action on NOI was stayed by 43 CFR 4.21(a). As proof they offer an October 9, 1991, affidavit by Scott A. Anderson, a SUWA volunteer, attesting to the fact that on September 25, 1991, he observed tire tracks away from established roads and trails which he purports to have been made by WGC when flagging a portion of the lines within the project area.

This evidence indicates that a portion of the vibrator and receiving lines were flagged some time prior to September 25, 1991, and that there was evidence that motorized vehicles had been driven away from established roads and trails. WGC admits having flagged the lines, but denies the allegation that it had used motorized vehicles when doing so. WGC Answer at 10. This activity occurred either prior to the Area Manager's September 11 approval of the NOI or after that approval but during the 30-day period of time for parties adversely affected by that approval to file an appeal (see 43 CFR 4.411(a)), when approval was not effective (see 43 CFR 4.21(a)). However, there is no proof that the tire tracks observed by Anderson were made by WGC. 9/ BLM could permit flagging prior to final approval of the NOI because it constituted casual use, as defined by 43 CFR 3150.0-5(b). See 43 CFR 3150.0-1. If we were to assume that the tracks were made by WGC, there is no evidence that BLM either endorsed it or was aware that it was taking place, and there is no evidence that BLM was informed of the activity

9/ The seismic survey and related activity approved by the Area Manager provided for an initial survey of the projected area, at which time the area would be traversed on foot and pinflags at appropriate points along the vibrator and receiving lines. See EA at 1-7.

prior to appellant's filing their SOR. Therefore, we cannot say that BLM improperly permitted that activity.

In general, we conclude that in his September 11, 1991, decision the Area Manager properly approved WGC's NOI to conduct oil and gas geophysical exploration operations in the Knoll Prospect. Therefore, the Area Manager's decision is affirmed. However, as a result of circumstances occurring after that contemplated activity may not take place during the nesting period of the peregrine falcon or while bald eagles are wintering in the canyons surrounding the project area without prior consultation with and determination by FWS that the proposed action would not jeopardize the continued existence of the peregrine falcon or the bald eagle.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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R. W. Mullen
Administrative Judge

I concur:

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Gail M. Frazier
Administrative Judge